17-433

OFFICE SUPREME COURT U.S.
FILED
MAR 17 1882
JAMES H. McKENNEY, CLERK

In Supreme Court of the United States.

R.S. ~~H. H.~~ ALLEN
vs.
W. N. McVEIGH. } No. 510.

P. PHILLIPS,
W. A. MAURY,
For Defendant in Error.

R. O. Polkinhorn, Printer, 632 and 634 D Street, Washington, D. C.

In Supreme Court of the United States.

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vs.
W. N. McVEIGH. } No. 510.

Writ of Error to the Supreme Court of Appeals of Virginia.

The defendant in error now comes and moves the court to dismiss the writ of error in the above cause for want of jurisdiction under Section 709 Revised Statutes, uniting therewith a motion to affirm, on the ground that, although the Record may show that this court has jurisdiction, it is manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument.

To H. O. Claughton, Esq.,
Attorney for Plaintiff in Error:

Take notice that the above motion will be submitted to the court three weeks from the date of service, for the reasons stated in the brief accompanying this notice.

Brief of P. Phillips and Wm. A. Maury, on Motion.

J. H. McVeigh & Son, at Alexandria, executed two promissory notes—one dated 31st May, 1861, for $2,500, the other dated 21st June, 1861, for $1,500.

Both of these notes were payable sixty days after date at the Exchange Bank, in favor of W. N. McVeigh, the defendant in error, and endorsed by him.

These notes not having been paid at maturity, the Exchange Bank, the owner of the notes, caused them to be protested—the first on the 2d August, 1861, the second on 23d August, 1861.

The protests recite as follows:

"In the same day, I delivered notice of protest to W. N. McVeigh, by leaving it at his dwelling, in the hands of his white servant, informing him that he, the indorser, was held liable for the payment of said note."

After the close of the war, the assets of the Exchange Bank passed into the hands of a receiver, who advertised them to be sold at public auction. McVeigh, who was present at the sale, gave notice that he denied all responsibility as indorser on these notes. Notwithstanding this notice, Allen, the plaintiff in error, became the purchaser thereof for the sum of $75, and in 1871, some five years after the close of the war, Allen commenced this action in the Corporation Court of Alexandria.

On the trial, which rested on the sufficiency of the notice, the jury, under instructions, found a verdict against McVeigh, the indorser. On writ of error to the Supreme Court of Appeals, the judgment was reversed and a *venire de novo* ordered.

On the second trial, a verdict and judgment were rendered for McVeigh on the following instruction:

"If on or about 30th May, 1861, and prior to the maturity of the notes, W. N. McVeigh, having previously sent his family, went himself within the Confederate military lines *with the intention of not returning to Alexandria* during its occupation by the United States forces, and accordingly remained with his family continuously within the

Confederate military lines, throughout the whole period of the war, and did not return to Alexandria with his family until the year 1874; *that such absence at the maturity of the said notes* respectively *was known, or, by the exercise of reasonable diligence, must have been known to the Exchange Bank* at Alexandria; that at the time of said maturity, the armed forces of the United States and the Confederate States confronted each other on lines immediately intervening between the city of Alexandria and the said W. N. McVeigh, so as to cut off and prevent actual intercourse between the two, and such intervention continued down to the end of the war, the notices of dishonor shown by the notarial certificates of protest are not sufficient to fix the liability of W. N. McVeigh as indorser, and the jury must find for him."

On this trial, the plaintiff asked instructions, which were refused, substantially as follows:

First. That the proclamations of the President of 15th and 19th April, 1861, did not prohibit McVeigh from returning to Alexandria while in possession of the United States. They did not prohibit intercourse by land.

Second. That neither these proclamations of 15th and 19th April, nor the ordinance of secession, nor the fact that the war was flagrant between the hostile sections, relieve the holder of the notes from giving notice of dishonor.

Third. That neither the ordinance of secession, nor the proclamations of the President, nor the existence of the war, oblige the indorser to be absent from his residence in Alexandria, nor relieve the holder of the notes from the duty of giving notice. That such absence was voluntary, and did not affect the rights and duties of the parties.

Fourth. That neither the proclamations of April, 1861, and August 16, 1861, nor the existence of the war, nor the ordinance of secession, oblige the indorser to be absent from his residence in Alexandria, nor relieve the holder of the notes from giving notice.

A new trial having been denied, the plaintiff petitioned the Supreme Court of Appeals for a writ of error—and this was also denied, the Court being of opinion that the judgment was "plainly right."

The case is now here on writ of error to the highest court of the State.

The instruction given for defendant not only fully covers the case, but as it merely announces a principle of general public law, it affords no ground for invoking the revisory jurisdiction of the court.

If, therefore, jurisdiction exists, it must be found in the refusal of the court to give the instructions asked for by plaintiff.

The first instruction has reference to the proclamations of 15th and 19th April, 1861.

The one declares that the laws are obstructed in the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas.

The other sets on foot a blockade of the ports within these States.

They no more affect the status of Virginia, or its inhabitants, than that of Massachusetts, or its citizens.

Being wholly irrelevant to the case, they were properly rejected.

It will be observed that in each of the other instructions there are, united with the foregoing proclamations, that of 16th August, 1861, the fact of war, and the ordinance of secession.

The court was called on to say to the jury that neither

of these *prohibited McVeigh* from returning to his residence, nor *relieved the holder* from giving notice.

If either one was irrelevant or erroneous, the court was justified in rejecting these *combined propositions.*

The instruction given involved the effect of the war to this extent—that it considered, as one of the elements constituting the defect of notice, "that at the time of the maturity of the notes the armed forces of the United States and the Confederate States confronted each other on lines immediately intervening between the city of Alexandria and the said W. N. McVeigh, so as to cut off and prevent actual intercourse between the two."

As heretofore said, this decision is not subject to the revisory jurisdiction of this court.

We further submit that the instructions refused present no Federal question, as neither the proclamations nor the ordinance of secession nor the existence of the war conferred upon the plaintiff *any "right, title, privilege, or immunity" which has been denied to him.*

To sustain the jurisdiction, it must be shown—

First. That the State court has decided against the validity of a treaty, statute, or authority of the United States; or—

Second. Has sustained the validity of a statute or authority of a State challenged as repugnant to the Constitution, treaties, or laws of the United States; or—

Third. Has decided against some title, right, privilege or immunity claimed under the Constitution, treaty, statute, commission or authority exercised under the United States.

It cannot be pretended that the decision of the State court falls under the first or second head of jurisdiction.

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First. That the State court has decided against the validity of a treaty, statute, or authority of the United States; or—

Second. Has sustained the validity of a statute or authority of a State challenged as repugnant to the Constitution, treaties, or laws of the United States; or—

Third. Has decided against some title, right, privilege or immunity claimed under the Constitution, treaty, statute, commission or authority exercised under the United States.

It cannot be pretended that the decision of the State court falls under the first or second head of jurisdiction.

We are then left to inquire whether it comes within the *third head.*

We may dismiss from consideration the effect that the proclamations, the ordinance of secession, and the war had on McVeigh. Whether they did or did not prevent his return to Alexandria is immaterial to the determination of the jurisdictional question; for its decision in no wise affects any *right, title, privilege, or immunity of the plaintiff in error.*

The jurisdiction must therefore depend upon that part of the instruction maintaining that the proclamations, the war and ordinance of secession, *did not relieve the holder from giving notice.*

As we have seen, the notices *were given* when the notes matured. If the instruction asked had been that by the proclamations, &c., the plaintiff *was relieved* from the necessity of *giving notice*, and this had been refused, it would then have presented the case of an "immunity," claimed under an authority of the United States.

But the instruction asked, that they *did not relieve* him from giving notice, on its face shows that no "right, title, privilege, or immunity" was claimed by the plaintiff, either under the proclamations, the war, or the ordinance of secession.

The sole question in the court below was, whether McVeigh, the indorser, had been duly notified of the non-payment of the notes sued on.

The protests given in evidence by the plaintiffs averred that the notices were left "at his residence in the hands of his white servant."

The protests and notices are dated August, 1861, some

three months after McVeigh had left Alexandria, his family having preceded him many weeks.

The construction of the State statute as to notice, and its application to the circumstances attending McVeigh's removal, are matters purely of local law, which have been several times decided both by this and by the State court.

In 1862, Earle & Co. recovered judgment against McVeigh on notes executed in 1861—the notice being thus given:

"Executed the within summons February 24, 1862, on James H. McVeigh, by leaving a copy thereof posted at the front door of his usual place of abode, neither he, nor his wife, nor any white person who is a member of his family and above the age of sixteen years, being found at his said usual place of abode."

To prevent the enforcement of this judgment, McVeigh filed his bill alleging want of notice of the action, and praying for an injunction.

This being granted by the State court, Earle & Co. removed the cause into the Circuit Court of the United States, where, upon the hearing, the injunction was made perpetual.

On appeal to this court, the decree of the Circuit Court was affirmed. The Court, in construing the State statute, say:

"That notice posted upon a house seven months after it had been vacated by the defendant and his family, and while they were residing within the Confederate lines, was not posted upon his 'usual place of abode,' and that a judgment founded on such defective notice was absolutely void."

The evidence on which this conclusion was reached, as recited by the Court, showed that "the family of McVeigh

left Alexandria six weeks before the Federal forces occupied the place, and that McVeigh left and joined his family within the Confederate lines six days subsequent to the entry of the Federal forces, and ever after remained with his family within the Confederate lines until the close of the war, and that these facts were known to the judgment-creditors and their counsel."

91 U. S., 503.

This case was decided at the October Term, 1875.

At the October Term, 1878, we have the decision in the case of the *Bank of the Old Dominion* vs. *McVeigh*.

The action was on notes executed in 1861, and endorsed by McVeigh. The notice of protest was, as in the case before us, left "at his former dwelling in the hands of his white servant."

The charge given, on which the jury found for defendant, was:

"That if, on or about 30th May, 1861, McVeigh, having previously sent his family, went himself within the Confederate lines, with the intention of not returning to Alexandria during its occupation by the United States forces, and remained with them continuously, within the Confederate lines, throughout the whole period of the war, and such absence at the maturity of said notes was known, or, by the exercise of reasonable diligence, must have been known to the plaintiff, there is no such evidence of notice of dishonor as is sufficient to fix the liability of the indorser."

This is substantially the charge given in the case now before the court, and on substantially the same evidence—the court holding the notice insufficient, and that, in order to bind the indorser, it was necessary to give notice within a reasonable time after the close of the war.

26 Grattan, 852.

The judgment for McVeigh, on appeal to the Supreme Court of the State, was affirmed, and, on writ of error from

this court, was here dismissed for want of jurisdiction, the Court saying:

"All that was decided was that, by the general principles of commercial law, if, during the late civil war, an indorser of a promissory note abandoned his residence in loyal territory, and went to reside within the Confederate lines before the note matured, a notice of protest left at his former residence was not sufficient to charge him, if his change of residence was known, or, by the exercise of reasonable diligence, might have been known to the holder."

98 U. S., 333.

We therefore submit that the Record does not show that any right, title, privilege, or immunity, asserted by the plaintiff, under the "Constitution, treaty, statute, commission or authority exercised under the United States," has been denied to him by the judgment complained of.

If, however, it should be held that the instructions do raise a Federal question, then we ask an affirmance of the judgment on the ground that such question was not necessarily involved in the controversy, and is so frivolous as not to need further argument.

When the Record shows, besides a Federal question, other matters decided by the State court sufficient to sustain the judgment over which this court has no jurisdiction, the judgment will be affirmed, however erroneously the Federal question may have been decided.

Murdock vs. *Memphis*, 20 Wall., 635.

P. PHILLIPS,
W. A. MAURY,
For Defendant in Error.

17-K33
OFFICE SUPREME COURT U. S.
APR 10 1882

Supreme Court of the U. S.

RICHARD S. ALLEN
vs.
WILLIAM N. McVEIGH.

On motion to dismiss for want of jurisdiction.

This was an action of debt by the holder of two dishonored and protested negotiable notes against the endorser.

At the date of the transaction, the maker, indorser, and holder were all residing in the city of Alexandria, Va. At the time of maturity and dishonor, the holder left notices of same at the residence of the endorser in Alexandria, with his white servant in charge of said residence. This, according to the rules of the commercial or general law, was a full performance of the contract of the holder of the notes, and fixed the liability of the endorser under his contract of endorsement. The defendant endorser denied the right of the holder to bind him by such notices, and claimed immunity from the liability thus fixed upon him by the general commercial law, and claimed further that under the circumstances of the case, the holder was obliged to give him notice of dishonor after the close of the war. It is thus evident that the contention of the defendant was, that the circumstances upon which he relied were of a character to affect and change the contract of endorsement upon

which he was sued, so that he was discharged from a liability which was fixed upon him by the performance on the part of the holder, of all that he was required to do under the contract.

The plaintiff contended that the circumstances, so relied upon by the endorser, did not affect the contract of endorsement either to relieve the endorser from the liability which was fixed upon him by the notices as given, nor to deprive the holder of the right to bind the endorser by the notices given him, nor impose upon the holder the duty of giving any other or further notice.

Thus, then, the issue was squarely presented. It only remains for us to consider *the circumstances* upon which the defendant relied as affecting his contract of endorsement, and see whether or not they present a Federal question. If they do, then this court has jurisdiction, and this motion to dismiss must be overruled.

No case just like this has ever been presented to the court. Some cases analogous have been, and this court has in such cases sustained the jurisdiction of the court.

What were the facts and circumstances which the defendant claimed, so to affect his contract of endorsement as to relieve him from liability which the notice left at his residence in Alexandria in charge of his white servant fixed upon him? Briefly these, as set up in the instruction which he prayed and which the court gave.

1. That a war existed between the United States and the Confederate States, at the time the Federal authorities occupied the city of Alexandria, and that he on the 30th day of May, 1861, under a pass from said authorities went within the Confederate lines, in adherence to the Southern Confederacy, with the inten-

tion of not returning to his residence in Alexandria as long as the city was in the possession of the Federal authorities, which he supposed would only be a short time—and that the military lines of the United and Confederate States confronted each other, intervening between Alexandria and the defendant when the notices were left at his residence in Alexandria, and prevented his return to his home.

2. That the existence of such war, made the holder of the notes and the endorser enemies, and prohibited commercial intercourse between them.

These are the public facts and acts, which the defendant claims affected his contract of endorsement, and gave him immunity from the liability which the notices left at his residence in Alexandria fixed upon him. Nothing can be plainer than the issue thus made.

In the first place then, did the war as it existed on the 2d day of August, 1861, when the notice of dishonor was left at the residence of the endorser in Alexandria, affect the contract of endorsement, so as to deprive the holder of the right to give that notice, or relieve the endorser from the liability which that notice fixed upon him.

This honorable Court has decided that this is a Federal question, and that the war recognized by the proclamation of the President prior to that of August, 16, 1861, did not make the citizens of the hostile sections enemies, nor prohibit commercial intercourse between them.

The question in the case of Matthews vs. McStea, was identical with that raised by the instruction granted for the defendant in error--and was raised in language almost identical. 20 Wall, 646.

Matthews, who resided in New York, was a member of a firm doing business in New Orleans. Subsequent to the proclamations of April, 1861, the partners in New Orleans, accepted a bill of exchange in the firm name.

McStea, the holder of the bill, sued Matthews on that acceptance. Matthews set up the defence, that at the date of the acceptance, war existed between the United States and Confederate States—that this war dissolved the co-partnership and revoked the agency of the New Orleans partners to bind him by the said acceptance.

In other words Matthews claimed immunity from liability on that acceptance, upon the ground that the United States had declared war against the Confederacy, by virtue of which war—he a resident of New York and his partners residents of New Orleans, were made enemies, and prohibited from holding commercial intercourse with each other.

This immunity was denied him by the Supreme Court of New York, and he prosecuted a writ of error to this court. McStea moved to dismiss that writ for want of jurisdiction.

This court overruled the motion, holding that "the only question decided against the plaintiff in error was the sufficiency of the acts of the President to *inaugurate a war* which would render invalid the contract, *and that this was one of the questions embraced* in the act of February 5, 1867."

A comparison of the terms of the defence made by Matthews, with the terms of the instruction granted for the defendant in error in this case, will demonstrate the identity of the question in that case with the question raised by this instruction.

The defence of Matthews was set up in the following language: "That on or about the 15th day of April, 1861, upon the State of Louisiana seceding from the United States, and war ensuing, that said State, including the city of New Orleans, was occupied and held by the enemy and so remained until on or about the 30th day of March, 1862, and that the plaintiff (and other parties herein,) who is and was a resident of New Orleans were enemies of the United States."

of Records, Volume 1, October Ter

What substantial difference is th
fence and this instruction?

Is it not the very life of ~~that~~ this i[illegible]on, that the fact of the secession of Virginia and the absence of the endorser within the Confederate lines in obedience to that ordinance and the existence of the war as waged by the armed forces of the United States and the Confederate States confronting each other on lines immediately intervening between the city of Alexandria and the endorser, so affected the contract sued on, that the notices of dishonor left at his residence in Alexandria were invalid? Was this not the identical Federal question raised in the case of Matthews vs. McStea, and in almost the identical language?

Now, suppose that the immunity set up by Matthews had been allowed him by the State Court, could not McStea have prosecuted a writ of error to this court? The only question involved was the construction of the Federal acts, and that construction must be adverse to one or the other of the parties. The meaning of the act is that when a right of immunity is set up *by either party* and is decided adversely to the *plaintiff in error*, the judgment may be re-examined in this court.

If the construction of these Federal acts had been in favor of Matthews, no matter how erroneous that judgment, he could not have prosecuted a writ of error to this court to have that judgment reversed.

It is quite evident then the immunity claimed by McVeigh involved a Federal question which was decided adversely to the plaintiff in error, and that he has a right to have that judgment re-examined by the Honorable Court.

The case of Bond *et al* vs. Moore was an action against an endorser. In that case the holder of the bill claimed that because of the existence of the war as a *fact*, it was illegal for him to demand payment of the bill until after the proclamation of the President of date June 13, 1865, and this court held that that was a Federal question. The only question in ~~this~~ case was the effect of the war and the proclamation of the President upon the "rights and duties of parties to commercial paper, and is the identical question presented and decided in this case. 93, U. S. 593.

The learned counsel for the defendant in error, concede (page 5 of their brief,) that this instruction involved the effect of the war to the extent—that it considered as one of the elements constituting the defect of notice, that at the time of the maturity of the notes the armed forces of the United States and Confederate States confronted each other on lines immediately intervening between the holder and endorser, but contend that this was a question of general public law. This Honorable Court has repeatedly held that the effect of the late war upon the validity of contracts, is not a question of general public law, but a Federal question embraced by the 709th section of the Revised Statutes.

In this respect the late war was "sui generis," and its effect upon contracts between residents of the different sections--depending upon the peculiar constitutional relations of the several States to the Federal Government and to each other, is *necessarily* a Federal question.

Nor can it be maintained that this instruction is substantially the same as that given in the Bank vs. McVeigh, 98, U. S. 333.

That instruction did not in terms, make the existence of the war, with confronting, intervening hostile lines "an element constituting the defect of notice." All that was decided in giving that instruction was, that notice left at the *former* residence of an endorser who had gone within the Confederate lines, by the general principles of commercial law, was not sufficient to charge him.

That instruction lacked what this is conceded to involve, to wit: *The existence of the war and the confronting hostile lines as one of the elements constituting the defect of notice.*

Whenever and in whatever manner the effect of the existence of the war, as inauguarated and prosecuted under the proclamations of the President, is *an element* in the question decided—a Federal question must *inevitably* be presented.

But the instruction granted for the defendant in error is only one part of this case. The instructions prayed by the plaintiff, and which were refused by the court, is the other and most important part of it.

These instructions (found on page 11 *et seq.* of the record,) substantially present the following Federal questions:

1. They claim that the existence of the war as inaugurated by the President prior to August 16, 1861, did not make the holder and endorser enemies—nor prohibit commercial intercourse between them, so as to make it unlawful for the holder to give the indorser notice of dishonor at the maturity of the notes—nor impose upon him the duty of giving further notice after the close of the war. That having the right then and there to give that notice, it was his duty to give it. That if he had failed to give it, and the next week the endorser had come home, a notice given after his return would have been invalid. That if to the plea of want of due notice, the holder had replied: "I could not give notice on the day of dishonor, because you were an enemy and away within the Confederate lines—the rejoinder of the endorser to the effect that his residence was open in charge of his servant, and that he was not an enemy, would have been fatal to the claim of the holder.

2. That neither the fact of the war, as inaugurated and recognized by the Proclamations of the President nor the Virginia ordinance of secession, in any way affected the contract sued on in this case, by prohibiting commercial intercourse between the holder and indorser, or in making them enemies; nor in preventing the indorser from being at or returning to his home in Alexandria.

It cannot be denied that the questions presented by these instructions are Federal questions, and that the plaintiff was entitled to have the ruling of the court upon them, and that the refusal to give the instruction, was a judgment adverse to the plaintiff in error, which according to the statute, should be re-examined by this court.

Much that has been said in the consideration of the defendant's instructions apply to these instructions, and need not be repeated.

In so far as the defendant relied upon his absence from his home, in adherence to the Confederacy in obedience to the Virginia Ordinance of Secession, to make him and the holder enemies, and make it unlawful for him to leave the Confederate territory and return to his home and his allegiance to the United States (and this was really his defence), this court has frequently decided not only that the defence is without the shadow of a foundation, but also that it presents Federal questions,

There are numerous decisions upon this point, among others:

Ludlow vs. Ramsay, 11 Wall., 581;
Mitchell vs. United States, 21 Id., 350;
Williams vs. Bruffy, 96 U. S., 176.

In the case of Ludlow vs. Ramsay, it was contended, as in this case, that the effect of the war upon the contract, was not a Federal question, but one only of general public law. This court held otherwise. It was also contended, that the confronting of the hostile lines intervening between the parties, made it physically as well as legally impossible for Ramsay to return to his home, but Mr. Justice Bradly, delivering the opinion of the court, thus annihilated that contention—" Why was the complainant in the country held by the Confederate troops? Why could he not return to Knoxville. Why could he not have communication with that place?

It was his place of residence. He says he left Knoxville a short time before the Federal troops arrived. Why did he leave? Was he forced to leave, and was his return forbidden? Could he not have returned at

any moment by submitting to the authority of the United States? Was not his absence voluntary? "The answer of McVeigh to these questions so appropriate to this case, is that even if there was no obstruction to his return to his home because of Federal acts, yet his allegiance to the Confederacy in obedience to the Virginia Ordinance of Secession was a lawful impediment.

This case is much stronger than that of Ludlow vs. Ramsay, for Ramsay never was within the Federal lines. McVeigh was, and left their protection to go within the Confederate lines, in adherence to the Confederacy.

In refusing to give the instructions prayed by the plaintiff in error, the State Court held that the acts of the Federal Government prior to the maturity of the notes sued on, inaugurated or recognized a war, which made the holder and indorser enemies—prohibited commercial intercourse between them, and so affected the contract sued on, as to deprive the holder of the right to bind the indorser, by giving the very notice of dishonor, which he had contracted to give, and which the indorser had contracted to receive.

Further, that even if this was not the effect of the Federal acts—that it was the effect of the Virginia Ordinance of Secession—thus holding that the said ordinance was valid.

But I need not argue to show that these instructions do present Federal questions, for the counsel for the defendant concede that they do; but as they contend, not in a proper form.

On page six of their brief, they say: "If the instructions asked had been, that by the proclamations, etc., the plaintiff was relieved from the necessity of

giving notice, and that had been refused, it would have presented the case of an "immunity" claimed under the authority of the United States."

This is too technical—it is *almost frivolous.*

The Federal question, they admit, is involved in the instructions, but because it is not presented in a certain form, this court has no jurisdiction of it.

The form of the instruction is, that the proclamations etc., did not relieve the holder from the duty of giving notice at the maturity of the notes, nor impose upon him the duty of giving further notice after the close of the war. According to the learned counsel—if the language had been that the proclamations, etc., did not deprive the holder of the right to give the notice, this would have presented a Federal question in a proper form.

Perhaps the verbal criticism is correct, but this does not relieve their conclusion from error.

The right and the duty in this case are convertible terms. The right to give the notice imposed the duty. If the proclamations, etc., relieved him from the duty. they did so only because they deprived him of the right. If the war had been of such character as to affect the contract *at all*, the holder would not have had the right to give the notices at the maturity of the notes, and notice after the close of the war would not only have been sufficient, but absolutely necessary.

On the other hand, if such was not the character of the war, then the holder did have the right to give the notices at the time of dishonor, because he was not relieved of his contract to do so—and was not obliged to give further notice after the close of the war.

After all that can be said, the question presented by the instructions was simply this: the "right" of the holder to bind the indorser by the notice which he gave—and his "immunity" from giving a further notice after the close of the war. If he had the right—to do what he did do—he had immunity from doing what the defendant claimed it was his duty to do.

This question was decided adversely to the plaintiff in error; and it is conceded that it is a Federal question,

— —

Passing from the criticism of the language in which the Federal question is presented, the learned counsel argue that even if it had been presented clearly and with philological accuracy—yet inasmuch as the instructions though presenting Federal questions, were defective because of immaterial and irrelevant matter the court properly refused to grant them. With the suggestion that we have not yet reached that point in this controversy, as the merits of the case are not involved in this motion, I notice very briefly the grounds of this criticism.

1. It is argued that the proclamations of April 15 and 19, 1861, had no reference to Virginia, and therefore the court was asked to instruct the jury upon immaterial and irrelevant matters.

This is a mistake. The proclamation of April 27th 1861, extends the provisions of the proclamation of April 19th, to the State of Virginia; and all the force which the proclamation of the 27th has, is the effect of the proclamation of the 19th.

Besides all this, the 4th instruction, in terms embraces the proclamation of April 27th, the language being that neither the proclamations of the President issued in

April, 1861, and August 16th, 1861—nor the existence of the war, nor the Ordinance of Secession, etc.

2. It is further argued, that as the proclamations of the 15th and 19th of April were immaterial and irrelevant, being disjunctively connected with other propositions which were material and relevant; that the refusal of the court to give the instructions was right for that reason.

This is a novel proposition. It has surely never been held, that it was error to give an instruction containing one proposition which was material and relevant, and correct—because it was disjunctively connected with another proposition, which, though correct, was immaterial, irrelevant, and merely harmless surplusage.

But this is a question on the merits of the case, and not involved in the consideration of the pending motion

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The next position assumed by the learned counsel is that this case is like that of Earle & Co. vs. McVeigh. Clearly there is no analogy. There was no Federal question in that case. The court had jurisdiction of it because it was a judgment of a Circuit Court of the United States.

In conclusion, the learned counsel for the defendant in error, ask the court to affirm the judgment below, notwithstanding the instructions raised a Federal question, on the ground that such question was not necessarily involved in the controversy, and is so frivolous as not to need further argument.

The Federal questions raised in this case were those upon which the judgment was solely and exclusively based—for if these had not existed, the notices would have been unquestionably valid and sufficient.

I am sure that there is nothing frivolous in asking this Honorable Court to protect a citizen in the enjoyment of the constitutional rights which have been denied him by the State Court, depriving him of his property to the amount of eight or ten thousand dollars.

Section 709, of the Revised Statutes, was enacted for the purpose of affording the citizens of the United States the re-examination of all judgments adverse to them, rendered by a State Court of last resort, upon questions arising out of the late war, and its effect upon contracts between residents of the hostile sections.

It was foreseen that State Courts would unconsciously view such questions from the stand point of the section where the court was, and in a light favorable to those who sympathized with them and shared their fortunes.

This case affirms the wisdom of the law, and shows that the foresight which suggested it, was prophetic.

Here is a party, who, in obedience to the Virginia Ordinance of secession, left his home within the Federal lines, and went within the Confederate lines, to adhere to the Confederacy in obedience to the Virginia Ordinance of Secession.

He leaves his residence furnished and equipped, in charge of his servants, awaiting his speedy return.

The holder of the notes left notices of dishonor at the time and place, when and where he had contracted to leave them, and the defendant had contracted to receive them. Suit is brought upon these notes, against the indorser. It is proved that he had a residence in Alexandria, where his servants were awaiting the expected speedy return of himself and family. It is proved—that he, as late as 1862, long after these notices had

been left at his residence in Alexandria, claimed this as his residence and voted for a delegate to represent Alexandria in the General Assembly of Virginia. It was proved that notices of dishonor of the notes sued on were duly left at his residence, with his white servant in charge thereof. The indorser claimed that he was not bound by these notices, because he had voluntarily left his home to adhere to the Confederacy in obedience to the Virginia Ordinance of Secession; that this absence was simply because of the presence of the Federal authorities in Alexandria; that he intended to return to his residence as soon as they were driven out, which he supposed would be accomplished in a very short time. That having thus put the hostile military lines between himself and the holder, he was by the state of war and his relations to the hostile Governments, an enemy, upon whom the holder could fix no liability by the performance on his part of the contract sued upon. That by reason of these public acts and the relations he sustained to them, the contract of indorsement was affected and suspended so that no liability was fixed upon him by the notices of dishonor given by the holder at the maturity of the notes, and that it was the duty of the holder to give him further notice after the close of the war.

The State Court sustained this defence, although in order to reach that judgment, it was necessary to disregard the decisions of this Honorable Court upon these very questions.

It is confidently believed that this Honorable Court will not refuse to give the plaintiff in error the protection, for the conservation of which the Constitution and laws of the land, have made this tribunal the ultimate sanctuary.

H. O. CLAUGHTON,
Counsel for Plaintiff in Error.

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IN THE

In Supreme Court of the United States.

RICHARD S. ALLEN
vs.
WM. N. McVEIGH.

No. 510.

Reply Brief on Motion to Dismiss or Affirm.

To maintain the jurisdiction we insist that the plaintiff in error must show that he claimed in the court below some title, right, privilege or immunity under the Constitution, or a treaty, statute, commission or authority of the United States, which was denied to him.

The revisory jurisdiction is strictly limited both by the Constitution and the act of Congress, and the decisions of the court are uniform, that the party complaining of the action of the State court must bring himself strictly within the provisions of the act conferring jurisdiction.

It is not sufficient to show that a federal question was decided. He must show that he asserted a claim to protection under some federal authority, and that this was denied to him.

Williams vs. *Norris*, 12 Wheat, 117;
Long vs. *Converse*, 91 U. S., 113;
Murdock vs. *Memphis*, 20 Wall, 635.

The plaintiff in error says that "no case just like this has ever been presented to the court"

His construction of the meaning of the act conferring the jurisdiction is, "that when a right or immunity is set up by *either party*, and is decided *adversely to the plaintiff in error*, the judgment may be re-examined in this court." p. 5.

He illustrates his position by reference to the case of *Matthews* vs. *McStea*, in which Matthews claimed that he was not liable on an acceptance made by his firm in New Orleans after the proclamation inaugurating war. The State court overruled this defence, and on writ of error from this court the jurisdiction was upheld.

"Now (says the plaintiff in error), suppose that the immunity set up by Matthews had been allowed by the State court, could not McStea have prosecuted a writ of error?"

We submit this is to be answered in the negative; for McStea, on his writ of error, would not be able to show that any right, title, privilege or immunity claimed by him had been denied in the judgment rendered in favor of Matthews.

On the construction given by the plaintiff in error to the jurisdictional act, his argument is "that the immunity claimed by McVeigh involves a federal question which was decided adversely to the plaintiff

in error, and that he has a right to have that judgment re-examined by this Honorable Court." p. 6.

That is, you may expunge all the instructions asked for by plaintiff in error, and, on the instruction which was given for McVeigh, the jurisdiction will be sustained.

If the court will read the instruction given, it will be seen that it involves no federal question whatever.

N. Y. Life Ins. Co. vs. *Hendron*, 92 U. S., 286.

If the instruction had been refused, McVeigh could not have prosecuted a writ of error.

But, as we have argued, if the instruction given had involved a federal question, this would not have entitled Allen to prosecute the writ.

As to the instructions asked for by the plaintiff in error and refused, we refer to what is said in the opening brief.

We there stated that, if the instructions had claimed that by reason of the proclamation the plaintiff *was released* from the necessity of giving notice pending the war, and had been refused, then the plaintiff would have presented a case of an "immunity" claimed under the authority of the United States.

But these were not the instructions; instead of claiming such immunity they only asked the court to say that the war, &c., did *not release him* from the necessity of giving notice.

In other words, that the war, &c., had no operation